

No. 14535

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**United States  
Court of Appeals**  
for the Ninth Circuit

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KRIS PETROLEUM, LTD., a Corporation, and  
KRIS PETROLEUM, INC., a Corporation,

Appellants,

vs.

WESLEY STODDARD, LITTLE VALLEY OIL  
CO., a Corporation, and TED ERDMANN,

Appellees.

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**Transcript of Record**

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**Appeal from the United States District Court for the  
Western District of Washington,  
Northern Division.**

**FILED**

**JAN 26 1955**

**PAUL F. O'BRIEN,**



No. 14535

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Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

Counsel for Appellants, Kris Petroleum, Ltd., and  
Kris Petroleum (Washington), Inc.:

GEORGE N. LUSCH,  
GRAHAM K. BETTS,  
Beyers Building (White Center),  
17th & W. Roxbury,  
Seattle 6, Washington.

Counsel for Appellee, Wesley Stoddard and Little  
Valley Oil Company:

WARD WILLIAMS,  
P. O. Box 671,  
Lynden, Washington.

Counsel for Appellee, Ted Erdmann:

LeCOCQ, SIMONARSON and DURNAN,  
F. W. DURNAN,  
Box 631,  
Lynden, Washington.



In the District Court of the United States for the  
Western District of Washington, Northern  
Division

No. C-140

WESLEY STODDARD and LITTLE VALLEY  
OIL CO., a Utah Corporation,

Plaintiffs,

vs.

KRIS PETROLEUM, LTD., a Foreign Corpora-  
tion, and KRIS PETROLEUM (Washing-  
ton), INC., a Corporation,

Defendants.

### AMENDED COMPLAINT

Come now the above-named plaintiffs and for  
cause of action against the defendants state and  
allege:

#### I.

That the plaintiff, Little Valley Oil Co., is a cor-  
poration organized and existing under the law of  
the State of Utah, and that its license fees have been  
paid; that said corporation is a part owner of one  
certain drilling rig the management and control of  
which it had, at all times hereinafter mentioned,  
given to the plaintiff Wesley Stoddard.

#### II.

That the plaintiff, Wesley Stoddard, is the other  
part owner of said drilling rig, and at all times  
hereinafter mentioned acted on behalf of himself

and as agent of Little Valley Oil Co., as pertains to its ownership interest in said drilling rig.

### III.

That the defendant, Kris Petroleums (Washington), Inc., is and was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Washington with corporate office at the Beyers Bldg., Seattle, Washington; that at all times hereinafter mentioned it acted on its own behalf and as agent of the defendant, Kris Petroleum, Ltd.; that the said corporation was filed with the Secretary of State of the State of Washington, on the 28th day of September, 1953, and that the incorporators and first directors of said corporation serving as such at all times hereinafter mentioned were:

Raymond Shaw, 827 Rogers Bldg., 470 Granville St., Vancouver, B. C.

George N. Lusch, Beyers Bldg., Seattle, Washington.

Rachel J. Lusch, Beyers Bldg., Seattle, Washington.

Yvonne L. Yarno, Beyers Bldg., Seattle, Washington.

Hugh Henry Roberts, 827 Rogers Bldg., 470 Granville Street, Vancouver, B. C.

### IV.

That the defendant, Kris Petroleum, Ltd., is an alien corporation and had, at all times hereinafter

mentioned, its corporate office at 827 Rogers Bldg., 470 Granville Street, Vancouver, B. C.

V.

That on or about the 15th day of April, 1953, plaintiffs commenced to furnish a drilling rig and gear and other customary drilling material, and to perform supervisory labor upon an oil and/or gas well of the defendant, Kris Petroleum, Ltd., located in Whatcom County, Washington, pursuant to written agreement dated April 1st, 1953, and oral agreement supplemental thereto entered into on or about the 15th day of April, 1953.

That a copy of the said written agreement is attached hereto, marked Exhibit "A" and by such reference made a part hereof.

That the said oral agreement provided that in addition to the material and labor to be supplied under the provisions of the said Exhibit "A" the plaintiff, Wesley Stoddard, was to contract for all other necessary equipment in his own name as an accommodation to defendant, Kris Petroleum, Ltd., which was not authorized to do business in the State of Washington; that defendant, Kris Petroleum, was to pay for said obligations or reimburse Wesley Stoddard therefor as soon as they were incurred.

That there was a balance due on account thereof on July 6, 1953, of \$9,980.70, all as more particularly appears in the itemized list marked Exhibit "B" attached hereto, and by such reference made a part hereof; that the defendants either paid said

accounts or by agreement removed plaintiffs, their drilling rig and equipment, from liability thereon, except the sum of \$3,627.15 on account of rentals and except the sum of \$468.78 on account of taxes to the State of Washington, all of said material and labor being supplied at the special instance and request of the defendant, Kris Petroleum, Ltd., as aforesaid, from April 15, 1953, to July 6, 1953.

## VI.

That the reasonable value of said materials furnished and labor performed by said plaintiffs for which they have made due demand and not been paid is the sum of \$3,627.17.

## VII.

That on the 1st day of October, 1953, plaintiff caused to be filed in the office of the auditor of Whatcom County, Washington, under Auditor's file number 761965, his Claim of Lien, a copy of which is attached hereto and marked Exhibit "C," and by such reference made a part hereof.

## VIII.

That it was necessary for plaintiff to employ counsel to prepare said notice of claim of lien and to record the same; that the reasonable value of counsel services for said preparation was and is \$10.00, and cost of recording was \$1.75; that the sum of \$800.00 is a reasonable sum to be allowed said plaintiff for attorney's fees for the foreclosure of this lien.

For a Second Cause of Action, Plaintiffs allege:

I.

Restate and reallege paragraphs I, II, III and IV of their first cause of action:

II.

That on or about the 18th day of October, 1953, plaintiffs commenced to furnish a drilling rig and gear and to perform supervisory labor upon an oil and/or gas well of the defendants, Kris Petroleum, Ltd., and Kris Petroleums (Washington), Inc., in Whatcom County, Washington, said well being the same as specified in plaintiffs' first cause of action herein, pursuant to an oral agreement entered into on or about the 18th day of October, 1953, wherein defendants agreed to pay plaintiffs the sum of \$150.00 per day for rental of said drilling rig and gear and supervisory labor, or \$125.00 per day without supervisory labor, all as supplemental to and based upon the written agreement of the parties dated April 1, 1953, herein attached and referred to as Exhibit "A"; that said material and labor were furnished at the special instance and request of the defendants as aforesaid from October 18, 1953, to December 2, 1953.

III.

That the reasonable value of said materials furnished and labor performed by the plaintiffs was and is the sum of \$8,050.00; that the defendants have paid to the plaintiffs the sum of \$2,944.24 on account thereof, and that there is due and owing

from the defendants to the plaintiffs the sum of \$5,105.76, for which due demand has been made and no part of which has been paid.

That an account of said materials furnished and labor performed, separately stated, together with the amount paid is attached hereto, marked Exhibit "D," and by such reference made a part hereof.

#### IV.

That on the 10th day of December, 1953, plaintiff caused to be filed in the office of the Auditor of Whatcom County, Washington, under Auditor's file number 765458, his Claim of Lien, a copy of which is attached hereto and marked Exhibit "E," and by such reference made a part hereof.

#### V.

That it was necessary for plaintiff to employ counsel to prepare said notice of claim of lien and to record the same; that the reasonable value of counsel services for said preparation was and is \$10.00, and cost of recording was \$1.75; that the sum of \$1,500.00 is a reasonable sum to be allowed said plaintiffs for attorney's fees for the foreclosure of this lien.

For a Third Cause of Action Plaintiff alleges:

#### I.

Restate and reallege paragraphs I, II, III and IV of their first cause of action.

#### II.

That on or about the 1st day of April, 1953, defendant, Kris Petroleum, Ltd., agreed with plaintiff

in writing to pay to plaintiff the sum of \$75.00 per day for each day that plaintiffs' rig was standing by the well site of defendants' in Whatcom County, Washington; that plaintiffs' drilling rig was standing by the well site of defendants' in Whatcom County, Washington, from July 7, 1953, to October 17, 1953, inclusive; that there is now due and owing from the defendant, Kris Petroleum, Ltd., to the plaintiffs on account of standby time the sum of \$7,425.00, no part of which has been paid although due demand has been made therefore; that said agreement in writing is attached hereto, marked Exhibit "A" and by such reference made a part hereof; that the sum of \$75.00 per day standby time was subsequent to the date of said agreement confirmed and acted upon by the parties hereto as agreed and reasonable.

Wherefore, plaintiffs pray judgment against the defendants, and each of them, as follows:

(1) For judgment in the sum of \$4,095.93, together with an attorney fee of \$810.00, and costs, on their first cause of action.

(2) For judgment in the sum of \$5,105.76, together with an attorney fee of \$1,510.00, and costs, on their second cause of action.

(3) For judgment in the sum of \$7,425.00, and costs, on their third cause of action.

(4) For judgment decreeing said judgments in their first and second causes of action to be first liens upon the real property herein described, that

the same be sold according to law and the practices of this Court to satisfy said judgments, and the costs of foreclosure.

(5) For such other and further relief as to the Court may seem just and proper in the premises.

/s/ WARD V. WILLIAMS,  
Attorney for Plaintiffs.

Duly verified.

Receipt of copy acknowledged.

EXHIBIT "A"

Kris Petroleums, Ltd.  
827 Rogers Building  
470 Granville Street  
Vancouver 2, B. C.

Telephones:

MARine 7027

PACific 8442

April 1, 1953.

W. Stoddard, Esq.,  
Ogden, Utah, U. S. A.

Dear Sir:

It is agreed that you will immediately ship a drilling rig, plus all accessories except drilling pipe, to Lynden, Washington, to complete a well which you have inspected. You further state that your drilling rig will reach a depth of at least 3000 feet, and is in good working condition. You will also

agree to supervise this drilling rig personally, and that at all times while it is on the drilling site. The cost to us agreed upon will be \$150.00 per twenty-four hours, drilling time. We are to supply all other necessary equipment and mud and bits, coring equipment, etc., pump, water, labor, fuel. There is no charge to us while the rig is in transit and the cost of stand-by time at the well site shall not exceed \$75.00 per day. You agree to move your rig up immediately and to proceed with the drilling without delay.

If two wells or more have been drilled by you, then the freight back to Ogden, Utah, shall be paid by you. If on the other hand we only drill the one well, then Kris Petroleums, Ltd., do hereby unconditionally and upon demand agree to pay the return freight.

Any monies advanced to you today, except freight charges, shall be deductible from the \$150.00 per day for your drilling rig. Settlement can be made for your rig every fifteen days, or as you prefer it.

This contract is binding on both parties.

Yours truly,

KRIS PETROLEUMS, LTD.

Per:—

/s/ H. H. ROBERTS,

H. H. ROBERTS,

President.

Accepted:

/s/ W. STODDARD.

## EXHIBIT "B"

Overshot rental .....	\$ 93.00
Drill collar rental .....	600.00
Ralph W. Young, accountant .....	425.00
Ralph W. Young, telephone .....	7.35
Iverson Lumber Co., lumber .....	507.89
Lynden Tribune, printing .....	30.08
Ekdahl & Seppala, Inc., supplies .....	11.57
Elliott & Verduin, fuel .....	47.38
Farmers Equipment Co., supplies .....	17.15
Industrial Supply Co., supplies .....	214.70
Van's Hardware, hardware .....	265.41
Reed & Hinton Motors, supplies .....	6.83
Republic Supply Co., supplies .....	18.84
Charles Stoddard .....	7.50
J. H. Shelly .....	16.50
Northwest Welding Co., welding .....	742.66
Standard Oil Co., fuel .....	38.76
Brooks Lumber Co., lumber .....	58.92
Falcon Products Co., supplies .....	261.45
R. E. Cole, mileage .....	29.66
National Supply Co., supplies .....	2.69
Telephone bill .....	189.49
Lynden Tribune (Judsons' bill) .....	2.47
Howard Cooper Corp., supplies .....	166.56
R. E. Cole, tank rental .....	262.50
Multi-Products Engineering Co., supplies ....	25.62
Automotive Parts Service, supplies .....	29.82
Lynden Department Store, supplies .....	9.95
Lynden Transfer, Inc., service .....	61.98
Bowen Fishing Tool Co., supplies .....	151.48
Puget Sound Power & Light, light .....	48.81
Associated Oil Field Rentals, supplies .....	100.00
Tax Commission, State of Wash., taxes .....	468.78*
Net rig rentals, Wesley Stoddard .....	3,627.15*

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 \$9,980.70

(\*Denotes unpaid accounts for which defendants are liable.)

EXHIBIT "C"

761965

Claim of Lien

Wesley Stoddard, Claimant, vs. Kris Petroleum, Ltd., a British Columbia Corporation, and Evergreen Gas & Oil Co., a Washington Corporation,

Notice Is Hereby Given:

That on or about the 15th day of April, 1953, Wesley Stoddard, at the request of Kris Petroleum, Ltd., a British Columbia corporation, commenced to perform labor and supply materials to be used upon the following described real property situate in the County of Whatcom, State of Washington, to wit:

The NE  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of Section 31, Township 41, Range 3 E. of W.M.

and to perform labor and furnish materials to be used upon all of the gas and/or oil rights and interests situate in and as a part of the following described real property situate in the County of Whatcom, State of Washington, to wit:

Township 40, Range 3 E. of W.M.; Township 40, Range 2 E. of W.M.; Township 41, Range 2 E. of W.M.

of which property the owner or reputed owners are Kris Petroleum, Ltd., a British Columbia Corporation, and Evergreen Gas & Oil Co., a Washington corporation, the performance of which labor and

furnishing of which materials ceased on the 6th day of July, 1953; that said labor performed and material furnished was of the value of \$13,532.85, for which labor performed and material furnished the undersigned claims a lien upon the property herein described for the sum of \$13,532.85.

/s/ WESLEY STODDARD,  
Claimant.

State of Washington,  
County of Whatcom—ss.

Wesley Stoddard, being sworn, says: That I am the claimant above named; I have heard the foregoing claim read and know the contents thereof, and believe the same to be just.

/s/ WESLEY STODDARD.

Subscribed and sworn to before me this 30th day of September, 1953.

[Seal] /s/ WARD V. WILLIAMS,  
Notary Public in and for the State of Washington,  
Residing at Lynden.

Received for record at 3:24 p.m., Oct. 1, 1953, at request of Ward Williams. Will D. Pratt, Auditor, Whatcom County, Washington

## EXHIBIT "D"

## Rental charges:

Oct. 18-24 .....	\$1,050.00
25-31 .....	875.00
Nov. 1-7 .....	875.00
17-24 .....	1,050.00
Nov. 25-Dec. 1 .....	1,050.00
Dec. 1, one day .....	150.00

	\$5,050.00
Moving rig .....	3,000.00

	\$8,050.00
Paid by Kris Petroleums (Wash.) .....	2,944.24
Amount due .....	\$5,105.76

## EXHIBIT "E"

765458

## Claim of Lien

Wesley Stoddard, Claimant, vs. Kris Petroleum, Ltd., a British Columbia Corporation; Kris Petroleum (Washington), Inc., a Washington corporation, and Evergreen Gas & Oil Co., a Washington corporation,

## Notice Is Hereby Given:

That on or about the 18th day of October, 1953, Wesley Stoddard, at the request of Kris Petroleum (Washington), Inc., a Washington corporation, commenced to perform labor and supply materials to be used upon the following described real prop-

erty situate in the County of Whatcom, State of Washington, to wit:

The NE  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of Section 31, Township 41, Range 3 E. of W.M.,

which real property is purportedly owned by I. H. Heppner and Jane Doe Heppner, and the gas and oil interest therein are owned by said corporations, and to perform labor and furnish materials to be used upon all of the gas and/or oil rights and interests situate in and as a part of the following described real property situate in the County of Whatcom, State of Washington, to wit:

Township 40, Range 3 E. of W.M.; Township 40, Range 2 E. of W.M.; Township 41, Range 2 E. of W.M.

of which property the owners or reputed owners are Kris Petroleum, Ltd., a British Columbia corporation; Kris Petroleum (Washington), Inc., a Washington corporation, and Evergreen Gas & Oil Co., a Washington corporation, the performance of which labor and furnishing of which materials ceased on the 2nd day of December, 1953; that said labor performed and material furnished was of the value of \$8,050.00, of which \$2,944.24 has been paid, leaving a balance for which the undersigned claims a lien upon the property herein described for the sum of \$5,105.76.

/s/ WESLEY STODDARD,  
Claimant.

State of Washington,  
County of Whatcom—ss.

Wesley Stoddard, being sworn, says: I am the claimant above named; that I have read the foregoing claim, know the contents thereof, and believe the same to be just.

/s/ WESLEY STODDARD.

Subscribed and sworn to before me this 10th day of December, 1953.

[Seal]       /s/ WARD V. WILLIAMS,  
Notary Public in and for the State of Washington,  
Residing at Lynden.

Received for record at 2 p.m., Dec. 10, 1953, at request of Ward Williams. Will D. Pratt, Auditor, Whatcom County, Washington.

[Endorsed]: Filed July 27, 1954.

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[Title of District Court and Cause.]

NOTICE OF APPLICATION TO  
INTERVENE

To: Wesley Stoddard, Plaintiff; Ward V. Williams, his attorney; Kris Petroleum, Ltd., Kris Petroleum, Inc., and George N. Lusch, their attorney:

You will please take notice that on Tuesday, the 27th day of July, 1954, at 2:00 o'clock p.m., of said day, or as soon thereafter as counsel can be heard,

at the courtroom of the above-entitled court, at the Post Office Building, in Bellingham, Whatcom County, Washington, the above-named defendant-intervener will move the Court for an order directing that he be permitted to intervene and to prepare and file his complaint in intervention and for such other and further order as to the Court may seem just.

Said application will be made and based upon this notice, and the application of the intervener's attorney, a copy of which is served herewith, and upon the pleadings, papers, records and files in this action.

Dated this 14th day of July, 1954.

LeCOCQ, SIMONARSON &  
DURNAN,

Attorneys for Intervener.

Receipt of copy acknowledged.

[Endorsed]: Filed July 23, 1954.

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[Title of District Court and Cause.]

APPLICATION OF TED ERDMANN  
TO INTERVENE

Comes Now Ted Erdmann and desiring an order to intervene in the above-entitled cause, shows to the Court the following:

(1)

That the above-entitled suit is an action wherein two alleged causes of action seek to foreclose labor

and material liens upon property described as the NE  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of Section 31, Township 41, Range 3 E. W.M., and Township 40, Range 3 E. W.M.; Township 40, Range 2 E. W.M.; Township 41, Range 2 E. W.M., said suit being filed on the 3rd day of June, 1954.

(2)

That your petitioner, Ted Erdmann, has a lien for labor performed upon the same oil well, listing same as being on the NW  $\frac{1}{4}$  of the SW  $\frac{1}{4}$  of Section 32, Township 41, North of Range 3 E. W.M.

(3)

That the description contained in the lien referred to by the petitioner refers to the same oil well as is now being foreclosed in this action.

That it is necessary for the proper foreclosure of your petitioner's lien that he be added as a party hereto.

Wherefore, your petitioner prays an order of this court permitting him to intervene and to prepare and file his complaint in intervention.

LeCOCQ, SIMONARSON &  
DURNAN,

Attorneys for Ted Erdmann.

Duly verified.

[Endorsed]: Filed July 14, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS APPLICATION OF  
TED ERDMANN FOR INTERVENTION  
(MOTIONS OF KRIS PETROLEUMS,  
LTD., KRIS PETROLEUMS (WASHING-  
TON), INC.)

Comes Now the Defendants, Kris Petroleum, Ltd., a foreign corporation, and Kris Petroleums (Washington), Inc., separately and individually but joining in this Motion for convenience and move the Court for an Order to Dismiss the Notice and Application to Intervene herein filed by Ted Erdmann for the reason that the same are fatally defective in the following particulars:

1. Failure to comply with or meet requirements of Rule 7, Federal Court Rules—"Motions" in that it fails to "state with particularity the grounds therefor";

2. Failure to comply with or meet the requirements of Rule 24 (c)—"Procedure";

Lack of Notice to all parties affected;

3. Application "fails to state the grounds therefor";

Application not accompanied by a pleading as required by Rule 24 (c);

4. and 5. Fails to allege facts to meet requirements of Rule 24 (a) or (b) as to show or indicate should be allowed to intervene

either "as a matter of right" or "as permissive."

6. Coming in as an original party so must allege jurisdiction, etc.—also see No. (3).

1. The Application for Intervention alleges a lien against property other than that involved in the principal action for labor without stating whether or not such lien was ever filed; without stating the amount thereof; without stating when or for whom such labor was furnished.

Your Defendants and moving parties therefor have no knowledge of any grounds for intervention and in such a case the Motion should be dismissed where such failure to particularly state is not merely inadvertent and has been objected to by the adverse party. *Steingut vs. Nat'l City Bank (D.C.N.Y.)*, 36 Fed. Sup. 486.

2. The application fails to comply with or meet the requirements of Rule 24 (c) in that no Notice was given to Little Valley Oil Co., Inc.

Rule 24 (c) provides in part: "A person desiring to intervene shall serve a Motion to Intervene upon all parties affected thereby. \* \* \*"

Counsel for the applicant for intervention, Mr. F. W. Durnan, was present in Court on July 13 during the hearing of the Plaintiff's Motion to Remand and Defendants' Motion to make the Little Valley Oil Co., Inc., a Utah corporation, a party, which Motion to make Little Valley Oil Co., Inc., a party was granted. The applicant in intervention

having appeared in Court and having knowledge of the Court's action, is bound by the Order of the Court that the Little Valley Oil Co., Inc., be made a party to this action. Upon such Order the said Little Valley Oil Co., Inc., having been made a party, became a necessary party to be notified of this Application for Intervention and since no Notice was given to Little Valley Oil Co., Inc., and since "intervention may be permitted only on Motion heard on Notice to all parties affected," *Cowan vs. Tipton*, 1 FRD 694, this Motion must be denied.

3. The Application for Intervention further fails to meet the requirements of Rule 24 (c) quoted in part as follows:

"\* \* \* the Motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought \* \* \*."

The applicant for intervention is for all intents and purposes an original party. See in *Re Raabe vs. Glisman & Co., Inc.* (D.C.N.Y.), 7-1 F. Sup. 678.

In the circumstances the application must state the grounds therefor by pleading a valid cause of action including, (a) Jurisdictional requirements as to citizenship; (b) amount involved, and (c) that he has a common question of law or fact against all parties. In each of these requirements his application is defective in that he makes no claim of any nature whatsoever against Stoddard, the Plaintiff; makes no claim against and has failed to notify Little Valley Oil Co., Inc., additional party.

4. Rule 24 (b) (Permissive Intervention) reads in part as follows:

“Upon due application anyone may be permitted to intervene in an action: \* \* \* (2) when applicant’s claim or defense and the main action have a question of law or fact in common. \* \* \*”

We call the attention of the Court to the fact that the Plaintiff Stoddard has claimed in two causes of action that there is due to Stoddard certain sums for labor and materials furnished by him to one or the other or both Defendants. This is an independent and personal claim of his having no question of law or fact in common with the alleged claim of Erdmann. Stoddard seeks to foreclose a lien upon certain described premises whereas Erdmann seeks to foreclose on other described premises. Erdmann has no claim in common with Stoddard but (if at all) has a separate and distinct claim of his own in which Stoddard has no more interest than he himself has in Stoddard’s claim; thus having no claim or defense in common with the main action, intervention will not be allowed under Rule 24 (b), *Dowdy vs. Hawfield*, 198 F. 2d 637 Cert. Den. 342 U.S. 830.

Likewise interveners will not be allowed to bring in entirely new issues which can better be adjudged elsewhere. *Bromley vs. Sobol*, 101 F. Sup 116, and it has been held that one creditor is not entitled to intervene in an action by another creditor when entirely different issues are involved. *First State*

Bank of Chariton, Iowa, vs. City State Bank of Thedford, 10 FRD 424, and permissive intervention was denied where it was not certain that the questions of law and fact presented should necessarily be the same as or confined to those presented on the existing issue. Baltimore and Ohio R. Co. vs. Thompson, 8 FRD 96.

5. The Application for Intervention fails to state any right of intervention under Rule 24 (a) (Intervention as of Right), 24 (a) (3) reads in part as follows:

“When the applicant is so situated as to be adversely affected by a disposition or other distribution of property which is in the custody or subject to the control or disposition of the Court or an officer thereof.”

As heretofore pointed out,

In the alleged lien of the Application for Intervention there is no property described that is involved in the two causes of action for lien foreclosure by the Plaintiff and hence the lien alleged in his application (if it be a lien) does not cover any property before the Court in the principal action and he could not be adversely affected by any disposition of the property in the principal action by any ruling of the Court herein.

6. No Pleading meeting requirements of “Original Party” status:

The applicant or Intervener is for all intents and purposes an Original Party and must be governed

by the rules of Pleading, Jurisdiction, etc., for original parties in the U. S. District Court. See in *Re Raabe vs. Glisman & Co., Inc.* (D.C.N.Y.), 71 F. Sup. 678.

Applicant Petitioner Has Filed No Pleading to Meet the "Original Party" Rule.

Upon the Basis of the Foregoing Stated Grounds for this Motion for Dismissal and the Authorities in support thereof, Defendants Pray an Order of this Court dismissing the Application of Ted Erdmann for Intervention in this proceeding.

GEORGE N. LUSCH,

By /s/ GEORGE N. LUSCH,  
Attorney for Kris Petroleums, Ltd., and Kris Petroleums (Washington), Inc., Defendants Herein.

Of Counsel:

/s/ GRAHAM K. BETTS.

Affidavit of Mail attached.

[Endorsed]: Filed July 24, 1954.

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[Title of District Court and Cause.]

MINUTE ENTRY—JULY 27, 1954

(Application of Ted Erdmann to Intervene)

Motion to dismiss application of Ted Erdmann for intervention (Motions of Kris Petroleum, Ltd.; Kris Petroleum (Wash.), Inc.).

Application of Ted Erdmann to intervene and

Motion to Dismiss or objections thereto called and argued.

On the Court's own motion, continued until Friday, July 30, 1954, at 1:45 p.m. The Court shortens the time for the service of the Application of Ted Erdmann to intervene. The Court directs that the application be served on all parties.

A true copy.

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In the District Court of the United States for the Western District of Washington, Northern Division

No. 140

WESLEY STODDARD and LITTLE VALLEY  
OIL COMPANY,

Plaintiff,

vs.

KRIS PETROLEUM, LTD., a Foreign Corporation,  
and KRIS PETROLEUM, INC., a Corporation,

Defendants,

TED ERDMANN,

Intervener.

NOTICE OF MOTION  
TO INTERVENE

To: Wesley Stoddard and Little Valley Oil Company, Plaintiff; Ward V. Williams, their attorney; Kris Petroleum, Ltd., Kris Petroleum, Inc., and George N. Lusch, their attorney:

You will please take notice that on Friday, the 30th day of July, 1954, at 1:45 o'clock p.m., of said

day; or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court, at the post office building, in Bellingham, Whatcom County, Washington, the above-named defendant-intervener will move the court for an order directing that he be permitted to intervene and to prepare and file his complaint in intervention and for such other and further order as to the court may seem just.

Said application will be made and based upon this notice, and the motion and complaint of the intervener's attorney, copies of which are served herewith, and upon the pleadings, papers, records, and files in this action.

Dated this 27th day of July, 1954.

LeCOCQ, SIMONARSON &  
DURNAN,  
Attorneys for Intervener.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 20, 1954.

[Title of District Court and Cause.]

DEFENDANT'S OBJECTION  
TO INTERVENTION

Lack of Jurisdiction of the Intervention, etc.

Defendants Kris Petroleums, Ltd., and Kris Petroleums (Washington), Inc., object further to the or any proposed Intervention by Ted Erdmann in any form:

A. This Court does not have jurisdiction of the proposed Intervention for the following and other stated reasons:

1. One Thousand Six Hundred Three and 04/100 (\$1603.04) Dollars is the amount of claim of lien or value asserted by Intervener applicant. This amount cannot now be changed to comply with Jurisdictional amount.

2. The alleged "lien claim" is on and describes property that is different than that property on which Plaintiff Stoddard Claims a Lien; therefore, the property in intervention is not before this Court.

3. If the lien claim be against Kris Petroleums (Washington), Inc.—it is then against a citizen of Washington and Intervener is a Citizen of Washington. There is no diversity of Citizenship.

Despite objection of Defendants the Court allowed Applicant until Friday, July 30th to present Intervention documents to comply with the law and the rules and the Court shortened the time of Notice therefor accordingly.

The Court, the parties to the Main Action, and the parties to the proposed intervention, must consider the application to Intervene on the basis of the facts and as they are alleged in the Application.

Counsel for Applicant Erdmann in Paragraph (2) of his Application describes property different from that described by Plaintiff Stoddard in his Motion. The property on which Erdmann claims a lien is not before the Court.

Counsel for Intervener delivered to Counsel for Defendants a copy of a purported "claim of lien" allegedly filed in the records of Whatcom County. This alleged "claim of lien" states "for which labor the undersigned claims a lien of \$1603.04."

Title 28 FCA page 182—District Court Jurisdiction — Sec. 1331 — Amount in Controversy:

"The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3000.00, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

By no stretch of the imagination can this amount be enlarged to comply with the jurisdictional limited amount of \$3000.00 exclusive of interest and costs.

The property described by Erdmann "on the N.W.  $\frac{1}{4}$  of the S.W.  $\frac{1}{4}$  of Section 32, Twp. 41, N of

R 3 EWM'' and the property described by Plaintiff Stoddard in the Main Action NE  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of Sec. 31, Twp. 41, Range 3 EWM; Twp. 40, Range 3 EWM; Twp. 40, Range 2 EWM; Twp. 41, Range 2 EWM.

It is clear from the files and records before this Court that the property on which Erdmann claims a lien is not before this Court.

Kris Petroleums (Washington), Inc., is a Washington Corporation. Defendants allege that Erdmann is now and at all material times was a citizen of the State of Washington—therefore there is no diversity of Citizenship.

In the circumstances and based on the objections of Defendants and authorities submitted in behalf of Defendants, the Intervention should not be granted in any form.

Respectfully submitted,

LAW OFFICES  
GEORGE N. LUSCH;

/s/ GEORGE N. LUSCH,  
Attorneys for Defendants Kris Petroleums, Ltd.,  
and Kris Petroleums (Washington), Inc.

Of Counsel:

/s/ GRAHAM K. BETTS.

Affidavit of Mail attached.

[Endorsed]: Filed July 29, 1954.

[Title of District Court and Cause.]

AMENDED MOTION TO INTERVENE

Comes Now Ted Erdmann and desiring an order to intervene in the above-entitled cause shows the Court the following:

(1)

That the above-entitled suit is an action wherein two alleged causes of action seek to foreclose labor and material liens upon property described as the NE  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of Section 31, Township 41, Range 3 E.W.M. and Township 40, Range 3 E.W.M.; Township 40, Range 2 E.W.M.; Township 41, Range 2 E.W.M., said suit being filed on the 24th day of June, 1954.

(2)

That the petitioner, Ted Erdmann, has a lien for labor performed upon an oil well, said claim of lien being filed on the 17th day of November, 1953, claiming as value of said labor the sum of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars, and alleging that the labor was performed for Kris Petroleum, Ltd., dba Kris Petroleum (Washington), Inc., the performance of such labor ceasing on the 5th day of November, 1953.

(3)

That the oil well upon which the petitioner performed his labor is one and the same oil well upon which and to whom the plaintiffs rendered services

and supplied materials, and this oil well is being foreclosed in this action.

(4)

That under the laws of the State of Washington, from which originate the petitioner's lien rights, the petitioner cannot bring action to foreclose his lien because of the existence of the above-entitled suit. That the petitioner's lien right will have expired before the above-entitled action shall be resolved and that it is therefore necessary for the proper foreclosure of your petitioner's lien that he be added as a party hereto. That the petitioner is not being represented by any of the present parties hereto and that the judgment of the Court in this cause will bind the petitioner and extinguish his lien rights.

Wherefore, your petitioner prays an order of this Court permitting him to intervene and be added as a party hereto.

LeCOCQ, SIMONARSON &  
DURNAN,

Attorneys for Intervenor.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed July 30, 1954.

[Title of District Court and Cause.]

## REPLY TO MOTION TO INTERVENE

(Reply of Defendants Kris Petroleums, Ltd., and Kris Petroleums (Washington), Inc., to Motion to Intervene proposed by Ted Erdmann.)

Defendants Kris Petroleums, Ltd., and Kris Petroleums (Washington), Inc., object and reply to the Motion to Intervene by Ted Erdmann and further object to the, or any proposed Intervention by Ted Erdmann in any form:

A. Defendants have previously objected and without waiving said objections as they are still in a large measure applicable, reallege said objections to the Motion to Intervene:

B. Defendants have previously filed in their Objections:

1. Motion to Dismiss the Application of Ted Erdmann for Intervention.

2. Defendants' Objections to Intervention (Lack of Jurisdiction of the Intervention) and now submit this Reply and further objections without waiving any of the previous objections.

### I.

The Court does not have jurisdiction:

The Motion to Intervene dated July 27, 1954, shows on its face an amount claimed as One Thousand Six Hundred Three and 04/100 (\$1603.04)

Dollars; in the circumstances the Court does not have jurisdiction because the jurisdictional monetary amount is lacking.

## II.

This Erdmann lien claim is on a different property than that claimed by Stoddard:

Par. 2 of the present Motion relates to an alleged lien purportedly filed on the 17th day of November, 1953. This alleged lien is the same as claimed in the par. 2 of the Application presented July 14, 1954—"That your petitioner, Ted Erdmann, has a lien for labor performed upon the same oil well, listing same as being on the NW  $\frac{1}{4}$  of the SW  $\frac{1}{4}$  of Sec. 32, Twp. 41 N of range 3 E.W.M."

As previously pointed out, Stoddard's lien claim relates to property different than that described by Erdmann, Stoddard's claim relating to: NE  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of Sec. 31, Twp. 41, Range 3 E.W.M.; Twp. 40, Range 3 E.W.M.; Twp. 40, Range 2 E.W.M.; Twp. 41, Range 2 E.W.M.

A copy of Erdmann's lien claim is attached to the proposed Complaint of Erdmann.

This phase has been fully answered in our objections on page 2 of "Defendants' Objections to Intervention," previously filed herein.

## III.

Replying to par. 3 and the statements therein "is one and the same oil well and this oil well is being foreclosed in this action" is a conclusion of the pleader, a conclusion of law and of fact; also

the Complaint of Stoddard is with relation to his lien and is not foreclosing any "oil well."

#### IV.

Replying to par. 4 of the Motion to Intervene, the statements of Counsel Durnan that he cannot bring an action to foreclose Erdmann's lien under the laws of the State of Washington because of the existence of this present action in the Federal Court is a conclusion of law and of the pleader and a mistake of law and of fact, especially since the lien claims are on different property.

This Erdmann claim is a separate and distinct action—relating to different property than that described and before the Court by the Claim of the Plaintiff Stoddard.

Neither the Motion to Intervene nor the accompanying pleading show that there is a common question of law or fact in this proposed intervention or in any claim of the intervener herein.

Erdmann can bring his action in the State Court, and judgment in this Court will not be binding on him and will not extinguish his lien rights, if any, especially in view of his admission in his Complaint that the lien claim by Stoddard is superior to the lien claim by Erdmann.

#### V.

No diversity of citizenship:

Since this present Motion presented the 27th day of July, 1954, and the accompanying Complaint and

lien claim—as well as the alleged lien claim copy furnished Lusch, dated 14 November 1953, claims the work was performed for Kris Petroleums, Ltd., dba Kris Petroleums (Washington), Inc.; since Erdmann and Kris Petroleums (Washington), Inc., are citizens of the State of Washington there is no diversity of citizenship in this intervention and the Court does not have jurisdiction.

It will be noted in the allegations of Erdmann's Motion and the Complaint, and the previous Notice and Application of Erdmann, Erdmann fails to allege that he is a citizen of or a resident of the State of Washington.

## VI.

For the reasons set out in the Motion to Dismiss, Defendants' Objection to Intervention, Lack of Jurisdiction of the Intervention, etc., and this Reply, Defendants object to the intervention and submit the intervention should not be granted in any form.

Respectfully submitted,

LAW OFFICES,  
GEORGE N. LUSCH,

/s/ GEORGE N. LUSCH.

Attorneys for Defendants, Kris Petroleums, Ltd.,  
and Kris Petroleums (Washington), Inc.  
Of Counsel,

/s/ GRAHAM K. BETTS.

[Endorsed]: Filed July 30, 1954.

[Title of District Court and Cause.]

COMPLAINT IN INTERVENTION  
AND CROSS-COMPLAINT

Comes Now Ted Erdmann, and for his answer to the plaintiff's complaint admits, denies, and alleges:

(1)

Admits the filing of said liens as therein alleged and admits that the lien or liens claimed by the plaintiff are superior to the lien of the intervener upon the property in question, as more fully appears in the cross-complaint hereinafter alleged.

As his complaint in intervention and as a cross-complaint against all parties now named in said action, Ted Erdmann, alleges:

(1)

That the above-entitled cause was removed from the Superior Court of the State of Washington, in and for the County of Whatcom, and the intervener's cause of action would have been a cause in said suit had removal not been made.

(2)

That at all times mentioned in this cross-complaint, and on or about the 4th day of July, 1953, the defendants Kris Petroleum, Ltd., were then the owners, or reputed owners, of the following described oil well, situated in Whatcom County, Washington, to wit: An oil well located in Township

41, Range 3 E.W.M., Whatcom County, Washington, and from July 4, 1953, being on or about said date, until November 5, 1953, were engaged in the drilling and maintenance of said oil well and as such employed and caused to be employed several persons including Ted Erdmann, the intervener herein.

(3)

That on or about the 4th day of July, 1953, at the request of Kris Petroleum, Ltd., the intervener, Ted Erdmann, commenced to perform labor upon the said oil well and that the furnishing of and performance of said labor ceased on the 5th day of November, 1953. That the reasonable and agreed value of said labor so performed was and is the sum of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars, no part of which has been paid, although demand for payment has been made.

(4)

That within ninety (90) days after the date of the last day of performance of said labor, to wit, November 17th, 1953, Ted Erdmann, intervener herein, for the purpose of effecting a lien against the oil well herein described, filed, in the office of the Auditor of Whatcom County, Washington, its verified notice of claim of lien, which said lien was thereupon duly recorded in Volume 16 of Liens, page 154, Records of Whatcom County, Washington. That a true, full and correct copy of said notice of claim of lien is attached hereto, marked Exhibit

“A” and made a part hereof. That for the recording of said lien this intervener paid the sum of \$1.25.

(5)

That no part of said amount of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars has been paid, and that no part of the sum claimed in said lien has been paid, and that the lien is now a valid and subsisting lien upon and against the property described therein, and that there is now due and owing to the intervener the full sum of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars, together with interest on said sum at six per cent (6%) per annum from November 5, 1953, until fully paid. That said intervener has commenced no other suit or action on account of said amount or on account of its said lien, and that all the property hereinabove mentioned and described is necessary for the convenient use and operation and that the sum of Five Hundred Twenty-Five and No/One Hundred (\$525.00) Dollars is a reasonable sum to be allowed this intervener as and for an attorney's fee on the foreclosure of its said lien.

(6)

That on or about the 28th day of September, 1953, or shortly thereafter, Kris Petroleum, Inc., commenced operations at the site of the well which prior to that time had been under the supervision and control of Kris Petroleum, Ltd., but that Kris

Petroleum, Ltd., ceased to operate the construction and drilling upon the incorporation and commencement of operation of Kris Petroleum, Inc., their successor.

Wherefore, Ted Erdmann, prays for judgment as follows:

1. That he have and recover of and from Kris Petroleum, Inc., and Kris Petroleum, Ltd., the sum of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars, with interest thereon at the rate of six per cent (6%) per annum from November 5, 1953, until paid. For the further sum of \$1.25 for recording said lien, and for attorney's fees for the foreclosure of said lien, in the further sum of Five Hundred Twenty-Five (\$525.00) Dollars, together with all of the intervener's costs and disbursements in said action.

2. That intervener's said lien be established in the amounts set forth in the paragraph herein above and that the same be foreclosed on the property described in paragraph (2) as a lien upon and against the

Oil well located in Township 41, Range 3  
E.W.M., Whatcom County, Washington,

and that the said property last described be sold by the Sheriff of Whatcom County, in the manner provided by law and according to the usual practices of this court in such cases, and that the proceeds be applied to the payment and satisfaction of all liens thereon in their order of priority and that

judgment be given the intervener for any deficiency if said proceeds are not sufficient to pay the intervener's lien, including interest, costs, and attorney's fee.

3. The Intervener prays for such other and further relief as to the Court may seem just and equitable in the premises.

LeCOCQ, SIMONARSON &  
DURNAN,

Attorneys for Intervener.

Duly verified.

## EXHIBIT A

TED ERDMANN,

Claimant,

vs.

KRIS PETROLEUM, LTD., dba KRIS PETRO-  
LEUM (WASHINGTON), INC.

## CLAIM OF LIEN

Notice Is Hereby Given that on the first (1st) day of August, 1953, Ted Erdmann, at the request of C. E. Cole, E. D. Judson and Raymond Shaw commenced to perform labor and did perform labor upon one certain oil well, where there had been and was to be certain drilling in said well, with said well located within the N.W.  $\frac{1}{4}$  of the S.W.

1/4 of Section 32, Township 41, North of Range 3 E.W.M., of which property the reputed owner is Kris Petroleum, Ltd., dba Kris Petroleum (Washington), Inc., the performance of which labor ceased on November 5, 1953, that said labor performed was of the value of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars, for which labor the undersigned claims a lien of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars in sum on the property herein described.

TED ERDMANN,  
Claimant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed July 30, 1954.

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[Title of District Court and Cause.]

#### ORDER PERMITTING INTERVENTION

Upon application of Ted Erdmann to intervene in the above-entitled cause and to prepare and file his complaint in intervention, the court, having read the application and being fully advised as to the facts,

It Is Therefore Ordered that Ted Erdmann be permitted to intervene in this action by filing his complaint in intervention, said complaint in inter-

vention to be timely filed, to all of which defendants except and their exceptions are allowed.

Done in Open Court this 30th day of July, 1954.

/s/ JOHN C. BOWEN,

Judge.

Presented by:

/s/ F. W. DURNAN,

Of LeCocq, Simonarson &  
Durnan.

After hearing copy received in Open Court over objection of Counsel for Kris Petroleum, Ltd., & Kris Petroleum (Washington), Inc.

/s/ GEORGE N. LUSCH.

7/30/54.

[Endorsed]: Filed and entered July 30, 1954.

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[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS  
INTERVENTION COMPLAINT

To: Ted Erdmann, Intervener, and LeCocq, Simonarson & Durnan, his Attorneys; and to Wesley Stoddard and Little Valley Oil Company, Plaintiffs, and their Attorney, Ward V. Williams:

You will please take notice that on Monday, the 23rd day of August, 1954, at 1:45 o'clock p.m., of said day; or as soon thereafter as counsel can be

heard, at the Courtroom of the above-named Court, at the Federal Courthouse, 5th & Madison, in Seattle, King County, Washington, the above-named defendants, Kris Petroleum will move the Court for an order directing that the Complaint and Cross-Complaint in Intervention of Ted Erdmann be dismissed for lack of jurisdiction and failure to state a claim upon which relief sought can be granted and on other grounds as set out in the Motion.

Said application for Order will be made and based on this Notice and the attached Motion, and upon the pleadings, papers, records, and files in this action.

Dated this 16th day of August, 1954.

LAW OFFICES  
GEORGE N. LUSCH,

By /s/ GEORGE N. LUSCH,  
Attorneys for Defendants, Kris Petroleums, Ltd.,  
and Kris Petroleums (Washington), Inc.

Of Counsel:

/s/ GRAHAM K. BETTS.

Affidavit of Mail attached.

[Endorsed]: Filed August 18, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS INTERVENTION  
COMPLAINT

On Grounds of (Lack of Jurisdiction, Failure to  
State Claim, etc.)

Comes Now Defendants, Kris Petroleum, Ltd.,  
and Kris Petroleum (Washington), Inc., by and  
through counsel of record and move the Court to  
Dismiss the Complaint or Intervention of Ted  
Erdmann and for such other and further relief  
as may be proper.

As grounds it is respectfully alleged:

1. Lack of Jurisdiction:

A. No lien can be foreclosed as action com-  
menced after eight months.

B. Jurisdictional amount below Three Thousand  
(\$3,000.00) Dollars.

C. No diversity of citizenship alleged or shown.

D. Complaint fails to state a claim upon which  
relief sought can be granted.

E. Complaint not against the same property sued  
on by Stoddard. Therefore, property not before  
the Court. This results in unsecured claim for  
One Thousand Six Hundred Three and 04/100  
(\$1,603.04) Dollars.

A-1—No Complaint filed and no service of Sum-  
mons made within eight (8) months as required,

therefore, lien cannot be foreclosed in this action in behalf of Erdmann. Complaint presented and filed July 30th, 1954.

A "Notice of Application to Intervene" and "Application to Intervene" (without any Complaint) were presented to the Court on or about July 14th or July 17, 1954; however, this does not commence an action either in State Court or Federal Court.

Summons has not been requested nor issued out of the U. S. District Court or out of the Superior Court of Whatcom County.

The Application or Notice to Intervene being without a Complaint attached or submitted did not and does not constitute a Complaint or commencement of an action in the State Court or Federal Court.

The Application and Notice to Intervene (without any Complaint or Summons) presented on July 23, 1954, were defective and on said July 23rd, the Court, over Defendant's objection, instructed Mr. Durnan, attorney for Erdmann, and George N. Lusch, attorney for Defendants, to again appear on the 30th day of July, 1954. The Court further stated that Erdman should by then comply with the rules and law as to Intervention in the U. S. District Court.

On July 30, 1954, Erdmann presented to the U. S. District Court a Motion to Intervene and attached and submitted an alleged "Complaint in Intervention and Cross-Complaint." This filing of the

Complaint on July 30th is actually the first “commencing of the action.”

Even at the present time no summons has been issued or requested. The commencing of the action on July 30 is more than eight (8) months since the filing of the lien; therefore, the intervenor, Erdmann, cannot recover on the face of his Complaint and cannot obtain the foreclosure of his lien. In the circumstances, he would only have an unsecured claim for One Thousand Six Hundred Three and 04/100 (\$1,603.04), which is under the Three Thousand (\$3,000.00) Dollar minimum.

An action is commenced in Washington State Courts under RCW 4.28.010 (Civil Action—How Commenced):

“Civil Actions in the Superior Court shall be commenced by the service of a Summons, as hereinafter provided, or by filing a Complaint with the Clerk of the Court.

“Unless service has been had on the defendants prior to the filing of the Complaint, the plaintiff shall cause one or more of the defendants to be served personally.”

RCW 4.08.190 Parties to Actions (Civil Procedure); Intervention:

“Intervention is made by a Complaint setting forth the grounds upon which the intervention rests, filed by leave of the Court on the ex parte motion of the party desiring to intervene.”

State Statutes and Civil Procedure Intervention also require Complaint as well as Federal Court Rules and U. S. Statutes.

RCW 4.08.200 Practice in Intervention:

“When leave to intervene is given, a copy of the intervener’s Complaint shall be served upon the parties to the action or Proceeding who have not appeared.

“The intervener’s Complaint shall also be served upon the attorneys for the parties who have appeared, who may answer or demur to it as if it were an original Complaint.”

Fed. Rules Digest—Vol. 1—Cum. Sup. page 2:

“Where the applicability of a state statute of limitations is concerned, state law defining commencement of action for that purpose controls over the language of Rule 3. However, a state statute providing that an attempt to commence an action is equivalent to commencement thereof when the summons is delivered to the sheriff, if personal service is made within sixty (60) days, is applicable to action in the Federal Court, the reference to the sheriff being treated as a reference to the United States marshal. *Nola Elec. Co., Inc., v. Reilly*, 14 F.R. Serv. 3.2, Case 1; 93 F. Supp. 164 (D.C. S.D.N.Y.), 1948, 1949.”

B-1—Jurisdictional Amount Below \$3,000.00:

Since the lien claim cannot be foreclosed, the

amount involved is the amount of claim, being \$1,603.04, as appears on the face of the Complaint, the Court is without jurisdiction because the jurisdictional monetary amount is lacking.

C-1—No Diversity of Citizenship Alleged:

Since Erdmann does not mention his residence and since Defendants state his residence is Whatcom County and since Kris (Washington) is a Washington resident, there is no diversity of citizenship that can be alleged or shown by Erdmann to sustain jurisdiction.

D-1—Complaint Fails to State a Claim upon which Relief Sought Can Be Granted:

The lien claim attached to the Complaint and made a part thereof, and which lien Erdmann seeks to have the Court foreclose upon is on a different property than that claimed by Stoddard, Erdmann stating:

NW $\frac{1}{4}$  of SW $\frac{1}{4}$  of Sec. 32, Twnshp. 41 N of Rng. 3, EWM.

As previously pointed out, Stoddard's lien claim relates to property different from that described by Erdmann, Stoddard's claim relating to:

NE $\frac{1}{4}$  of SE $\frac{1}{4}$  of Sec. 31, Twp. 41, Rng. 3 EWM, Twp. 40, Rng. 3 EWM, Twp. 40, Rng. 2 EWM, Twp. 41, Rng. 2 EWM.

Therefore, the same property involved in the lien claim of Stoddard is not before the Court in

the attempted intervention of Erdmann and therefore, there is not the same property, not a common question of law or fact, Erdmann has no right to establish or foreclose any lien herein and, further, the Court has no jurisdiction over Erdmann's claim.

The Complaint fails to state a claim, also, for the reason that he does not allege the jurisdictional requirements of an original action sufficient in any respect to sustain jurisdiction or to recover thereon.

Cannot foreclose lien—his time limitation has expired: RCW 60.04.100—Duration of Lien—Limitation of Action:

“No lien created by this chapter binds the property subject to the lien for a longer period than eight (8) calendar months after the claim was filed, Unless an Action Is Commenced Within That Time to Enfore It.”

E-1—Without the Alleged Lien, the Complaint Is Against Property Not Before the Court:

As has been pointed out to the Court previously under the allegations of the Complaint and records and files, the intervener has failed to state a claim upon which relief sought can be granted, and has failed to allege or show a right to intervene “as a matter of right” or to be entitled to intervene as “permissive” because the same property is not before the Court; fails to allege or show common questions of law or fact. The Complaint is defective as to the property.

Wherefore, Defendants, Kris Petroleum, Ltd., and Kris Petroleum, Inc., move the Court to dismiss the intervention Complaint and dismiss the Intervention and move for such other and further relief to which the Court may find them entitled.

LAW OFFICES

GEORGE N. LUSCH,

/s/ GEORGE N. LUSCH,

Attorneys for Defendants, Kris Petroleums, Ltd.,  
and Kris Petroleums (Washington), Inc.

Of Counsel:

/s/ GRAHAM K. BETTS.

Affidavit of Mail attached.

[Endorsed]: Filed August 18, 1954.

In the District Court of the United States for the  
Western District of Washington, Northern  
Division

C-140 (Bellingham)

WESLEY STODDARD, LITTLE VALLEY OIL  
CO., and TED ERDMANN,

Plaintiff,

vs.

KRIS PETROLEUM, LTD., a Foreign Corpora-  
tion, and KRIS PETROLEUM, INC., a Cor-  
poration,

Defendants.

ORDER DENYING MOTION TO DISMISS  
COMPLAINT OF INTERVENER

This Matter coming on regularly for hearing in open court upon the motion of the Defendants to dismiss the Complaint in Intervention of the Plaintiff Intervener Ted Erdmann, George N. Lusch representing the Defendants, Kris Petroleum, Ltd., and Kris Petroleum, Inc., and F. W. Durnan representing the Plaintiff Intervener Ted Erdmann, and the Court having heard the arguments of counsel and being fully advised in the premises, with the objection of the counsel for the Defendants being noted, and being overruled, and exceptions being allowed defendants; and the Court finding the filing of said intervention complaint and action was timely and that the Court has jurisdiction of them;

It Is Hereby Ordered, Adjudged and Decreed that the Motion to Dismiss said Intervention Complaint be and is Denied and Overruled.

Done in Open Court this 27th day of August, 1954.

/s/ JOHN C. BOWEN,  
Judge.

Presented by and Approved:

/s/ F. W. DURNAN,  
Counsel for Plaintiff  
Ted Erdmann.

[Endorsed]: Filed August 27, 1954.

---

[Title of District Court and Cause.]

ORDER ON MOTIONS TO DISMISS A/C LACK  
OF JURISDICTION, FAILURE TO STATE  
A CLAIM, ETC.

Be It Remembered that on this the 27th day of August, 1954, in Open Court, in due order, came on to be considered the Motion to Dismiss Intervention Complaint by Defendants Kris Petroleums, Ltd., a foreign Corporation, and Kris Petroleums (Wash.), Inc.; the Motions being to the Complaint in Intervention and Cross-Complaint of said Intervener Ted Erdmann.

On July 30th, 1954, the Court, after due setting on written Motions and Oral Argument granted

Leave to Intervene to Ted Erdmann, over objections and exceptions of Defendants; and the Court then on said July 30th Ordered the "Complaint in Intervention and Cross-Complaint" of Ted Erdmann filed in this Court in this Action; also over the objections and exceptions of said Defendants;

On August 27, 1954, in Open Court on Written Motions and Oral Arguments the Court refused the Motions to Dismiss said Complaint upon the asserted grounds of Lack of Jurisdiction and Failure to State a Claim upon Which Relief can be granted.

The Court finding the Intervention Application was timely even though it did not present or file or submit at that time a "Complaint" and that even though said Complaint was filed July 30th—(after the 8-month period to commence an action by law to foreclose and establish a lien) that said Complaint is timely filed and States a Claim upon which relief sought can be granted.

The Court finding it has jurisdiction of the Intervention and of the Complaint

It Is Therefore Ordered That the Motions of Defendants are in all things refused and denied

To All of Which the Defendants in open court duly objected and excepted and stated that they will file a formal Notice of Appeal from the Intervention and Refusal of the Motions to Dismiss said Appeal being to the Circuit Court of Appeals for the 9th Circuit of the United States.

Done in Open Court this 27th day of August,  
1954.

.....,

Presented and approved by Counsel for Defendants:

/s/ GEORGE N. LUSCH,  
LAW OFFICES  
GEORGE N. LUSCH,  
Counsel for Plaintiff  
Intervener.

The foregoing order form was tendered to the undersigned judge for signing by him, but he respectfully declined to do so, on this 27th day of August, 1954.

/s/ JOHN C. BOWEN,  
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed August 27, 1954.

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE U. S. COURT  
OF APPEALS FOR THE NINTH CIRCUIT  
FROM JUDGMENT, ACTIONS AND OR-  
DERS OF THE U. S. DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

Comes Now Kris Petroleums, Ltd., a foreign corporation, and Kris Petroleums (Washington), Inc., a corporation, as Defendants and give Notice of

Appeal to the U. S. Court of Appeals for the 9th Circuit sitting at San Francisco, California.

At this time the parties of record are:

Wesley Stoddard, not a resident of Washington State, original Plaintiff; and Little Valley Oil Company, a Utah Corporation, Plaintiff, and

Kris Petroleums, Ltd., a foreign Corporation, and Kris Petroleums (Washington), Inc., a resident of State of Washington, Defendants.

Intervener—Ted Erdmann, citizen and resident of State of Washington.

The Notice of Appeal and Appeal being from the Judgment granting Intervention and from the actions and Orders of Hon. John C. Bowen, Judge of said Court:

I. From the Judgment, Order and action finding that the Court has jurisdiction and in finding that the Intervention Complaint was timely filed even though it was filed after the expiration of the eight (8) months period allowed by law for “Commencing of an action to establish and foreclose a lien” and in finding that the Complaint in Intervention stated a claim upon which relief sought could be granted.

II. From the Judgment, action and Order of the Court on July 30, granting the Motion to Intervene; and the Judgment and Order Permitting Interven-

tion and Ordering and Allowing Filing of the "Complaint in Intervention and Cross-Complaint" of Ted Erdmann;

III. From the Judgment, action and Order of date July 27, which failed to grant the Motion to Dismiss the "Application of Ted Erdmann for Intervention"—Motion having been duly and timely filed and presented herein;

IV. From the actions of the Court in arbitrarily resetting the matter for July 30, to allow Erdmann to attempt to comply with laws and rules of Intervention;

V. From the Judgment, actions and Orders of August 27, 1954, in refusing the Motion of Defendants Kris to Dismiss the "Complaint in Intervention and Cross-Complaint" of Ted Erdmann.

VI. In refusing to enter Order Dismissing the Intervention and then in refusing to enter Order in the form submitted by Counsel for Defense, and in entering the Order in the form submitted by Intervener;

To all of which, exceptions were made and duly allowed.

Notice to be given to Attorneys for Wesley Stoddard and for Little Valley Oil Co., a Utah Corporation—Ward Williams; and for Attorneys for Intervener Ted Erdmann—F. W. Durnan. P. O. Address: Mr. Ward Williams, Attorney, Lynden,

Washington. Mr. F. W. Durnan, (Simonarson, Le-Cocq and Durnan), Attorneys, Lynden, Washington.

LAW OFFICES

GEORGE N. LUSCH,

By /s/ GEORGE N. LUSCH,  
Attorneys for Defendants Kris Petroleums, Ltd.,  
and Kris Petroleums (Washington), Inc.

Of Counsel:

/s/ GRAHAM K. BETTS.

[Endorsed]: Filed August 30, 1954.

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[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents, That we, Kris Petroleum, Limited, and Kris Petroleum, Washington, Inc., as Principal, and Continental Casualty Company, a corporation of the State of Illinois, as surety, are held and firmly bound unto Wesley Stoddard and Little Valley Oil Company, in the sum of Two Hundred Fifty Dollars (\$250.00), lawful money of the United States, to be paid by them and their successors, to which payment well and truly made we bind ourselves and each of us, jointly and severally, and each of our successors, by these presents.

Sealed with our seals and dated this 30th day of August, 1954.

Whereas, the above-named Kris Petroleum, Limited, and Kris Petroleum, Washington, Inc., have prosecuted an appeal to the United States Ninth Circuit Court from the Western District of Washington, Northern Division, in the above-entitled cause;

Now, Therefore, the condition of this obligation is such that if the above-named Kris Petroleum, Limited, and Kris Petroleum, Washington, Inc., shall prosecute its said appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

KRIS PETROLEUM, LIMITED, AND KRIS  
PETROLEUM, WASHINGTON, INC.,

By /s/ GEORGE N. LUSCH.

[Seal] CONTINENTAL CASUALTY  
COMPANY,

By /s/ W. H. HICKS,  
Attorney-in-Fact.

[Endorsed]: Filed August 30, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT  
COURT, TO RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original documents and papers in the file dealing with the above cause as the record on appeal herein from the Order Denying Motion to Dismiss Complaint of Intervenor filed August 27, 1954, to the United States Court of Appeals for the Ninth Circuit, at San Francisco, said papers being identified as follows:

1. Petition for Removal, with Copy of complaint in Whatcom County Superior Court Cause No. 34109 attached, with summons, filed June 22, 1954.
2. Bond on Removal, filed June 22, 1954.
3. Motion of Kris Petroleum, Ltd., to Dismiss, filed June 26, 1954.
4. Motion of Kris Petroleum (Washington), Inc., to Dismiss, filed June 26, 1954.
5. Motion to make more definite and certain or for a bill of particulars, filed June 26, 1954.

6. Motion to make Little Valley Oil Company an additional party plaintiff, filed June 26, 1954.

7. Plaintiff's Motion for Remand, filed July 7, 1954.

8. Notice of hearing on motions, filed July 7, 1954.

9. Defendants' memorandum on Motion to Dismiss, filed July 13, 1954.

10. Defendants' memorandum on Motion for Remand, filed July 13, 1954.

11. Application of Ted Erdmann to Intervene, filed July 14, 1954.

12. Notice of Application to Intervene, filed July 23, 1954.

13. Motion to Dismiss Application of Ted Erdmann for Intervention, filed July 24, 1954.

14. Amended Complaint, filed July 27, 1954.

15. Memorandum of Authorities by Intervenor, filed July 27, 1954.

16. Defendants' memorandum of authorities on Defendants' Motion to Dismiss petition for Intervention, filed July 27, 1954.

17. Additional memorandum of authorities by Defendants re: Objections to Intervention by Ted Erdmann, filed July 29, 1954.

18. Defendants' Objections to Intervention, filed July 29, 1954.

19. Reply to Motion to Intervene, filed July 30, 1954.

20. Order Permitting Intervention, filed July 30, 1954.

21. Amended Motion to Intervene, filed July 30, 1954.

22. Complaint in Intervention and Cross-Complaint, filed July 30, 1954.

23. Motion to Dismiss Intervention Complaint, filed August 18, 1954.

24. Notice of Motion to Dismiss Intervention Complaint, filed August 18, 1954.

25. Order Denying Motion to Dismiss Complaint of Intervenor, filed August 27, 1954.

26. Order on Motions to Dismiss A/C Lack of Jurisdiction, Failure to State a Claim, etc., filed August 27, 1954.

27. Notice of Appeal to the U. S. Court of Appeals for the Ninth Circuit from Judgment, Actions and Orders of the U. S. District Court, Western District of Washington, Northern Division, filed August 30, 1954.

28. Cost bond on appeal, filed August 30, 1954.

29. Notice and Designation of Contents of Record on Appeal request by Appellant, filed September 15, 1954.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause to wit: Filing fee, Notice of Appeal, \$5.00, and that said amount has been paid to me by counsel for appellant.

In Witness Whereof I have hereunto set my hand

and affixed the official seal of said District Court at Bellingham, this 27th day of September, 1954.

[Seal]                      MILLARD P. THOMAS,  
Clerk.

By /s/ MARJORIE J. EDQUIST,  
Deputy Clerk.

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[Endorsed]: No. 14535. United States Court of Appeals for the Ninth Circuit. Kris Petroleum, Ltd., a Corporation, and Kris Petroleum, Inc., a Corporation, Appellants, vs. Wesley Stoddard, Little Valley Oil Co., a Corporation, and Ted Erdmann, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 1, 1954.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals, for  
the Ninth Circuit.

In the United States Court of Appeals for the  
Ninth Circuit

No. 14535

KRIS PETROLEUM, LTD., a Foreign Corpora-  
tion, and KRIS PETROLEUM, INC., a Cor-  
poration,

Appellants,

vs.

TED ERDMANN,

Appellee,

WESLEY STODDARD and LITTLE VALLEY  
OIL COMPANY, a Corporation,

Plaintiffs.

APPELLANT'S STATEMENT OF POINTS  
TO BE RELIED UPON

1. The Application to Intervene, filed July 14, 1954, was defective in that it was not accompanied by any pleading as required by Rule 24(c).

2. The intervenor's action is barred by the Statute of Limitations.

(a) The Motion to Intervene, filed July 30, 1954, which motion was by order of the Court marked "amended" over the objection of the appellants, constituted the "commencement" of an action to foreclose a purported lien upon the face of which it appears to be barred by the Statute of Limitations of time within which a lien foreclosure may be com-

menced, as provided by R.C.W. 60.04.100, limiting the commencement of action for foreclosure of a lien to a period not more than eight (8) months after its filing, which eight (8) months period in this case expired on the 17th day of July, 1954, said date being the last day of the said eight (8) months period within which foreclosure proceedings could be commenced.

(b) It is the contention of the appellants that since the original Application to Intervene was fatally defective in not complying with Rule 24 (c), it could not be amended and consequently it was an original proceeding notwithstanding the purported arbitrary direction of the District Court that it be marked "amended."

(c) That the District Court obtained no jurisdiction of the res and is without jurisdiction to determine the controversy between appellants and intervenor.

3. That the Complaint in Intervention alleges a lien upon different property from that sought to be foreclosed in the principal action. Even though the Complaint in Intervention be considered as timely filed, which appellants deny, then it presents no common question of law or fact, required by Rule 24(b).

4. The amount in controversy alleged in the Complaint in Intervention, to wit: One Thousand Six Hundred Three Dollars and Fours Cents (\$1,-

603.04), fails to meet the jurisdictional amount required for a United States District Court.

5. No proper allegations of citizenship by intervenor.

6. That the only property in the custody of or under the jurisdiction of this Court is the property described in the lien involved in the Plaintiff's action and not that described in the Complaint in Intervention, and hence the intervenor does not claim any interest in property within the custody of or subject to the jurisdiction of the Court in the principal action.

7. Error in Denying Motions of Defendants.

LAW OFFICES

GEORGE N. LUSCH,

By /s/ GEORGE N. LUSCH,

Attorneys for Defendants, Kris Petroleums, Ltd.,  
and Kris Petroleums (Washington), Inc.

Of Counsel:

/s/ GRAHAM K. BETTS.

Notice has been sent to Ward Williams, Attorney for Wesley Stoddard and Little Valley Oil Co., Lynden, Washington; and to F. W. Durnan of Simonarson, LeCocq and Durnan, Attorneys for Ted Erdmann, Lynden, Washington. •

GEORGE N. LUSCH.

[Endorsed]. Filed November 8, 1954.

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7. Error in Denying Motions of Defendants.

LAW OFFICES

GEORGE N. LUSCH,

By /s/ GEORGE N. LUSCH,

Attorneys for Defendants, Kris Petroleums, Ltd.,  
and Kris Petroleums (Washington), Inc.

Of Counsel:

/s/ GRAHAM K. BETTS.

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GEORGE N. LUSCH.

[Endorsed]. Filed November 8, 1954.